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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

KERI CACHE,

Defendant and Appellant.

A159537

(Contra Costa County  
Super. Ct. No. 5-170591-2)

Keri Cache was driving drunk when she sideswiped a car parked on the side of the highway, killing its driver. Convicted by a jury of murder and other crimes stemming from the incident, she asserts the court erred when it denied her request to substitute private counsel for her appointed attorney on the first day of trial; admitted recorded 911 calls from an off-duty police officer who witnessed the incident; and dismissed a juror during deliberations. Cache also contends there was insufficient evidence to support her conviction for driving without an interlock ignition device.

We conclude the court violated Cache's constitutional right to counsel of her choice when it rejected her request to substitute retained counsel Christopher Varnell for the deputy public

defender and to grant a 45- to 60-day continuance to allow him to prepare. The error requires reversal as a matter of law, so we do not reach Cache's remaining contentions.

### **BACKGROUND**

On the night of February 27, 2016, Cache drank five cocktails at P.F. Chang's restaurant in Emeryville between her arrival around 9:00 p.m. and departure at 11:20.

Shortly after midnight on February 28, off-duty Berkeley police officer Aron Belveal was driving east on Interstate 80 when he spotted Cache's white Chevrolet Malibu veering in and out of its lane, swerving dangerously toward other cars, and almost rear-ending another car. Suspecting the driver was under the influence, Belveal called the Highway Patrol and reported his observations to a 911 dispatcher.<sup>1</sup>

Still on the call, Belveal was in the number two lane following about two car lengths behind the Malibu when it drifted over the white line between the slow lane and the shoulder and sideswiped a car stopped on the side of the highway. The officer "saw just debris fly from that, and like for a second lit up by I think the white car's headlights I saw a person—I couldn't tell if it was a man or a woman—but from my perspective, it almost looked like somebody jumped back with [both hands up in the air]. I couldn't tell if they jumped back to get out of the way, or if the white car had hit it. I didn't know." The Malibu slowed briefly, then kept driving.

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<sup>1</sup> A recording of the 911 call was played for the jury.

In fact, the Malibu had struck Jose Daza, Jr. Daza had been driving home from a family event with his fiancée when he pulled over onto the shoulder to inspect what sounded like a flat tire. He was standing near the left side-view mirror when the Malibu approached, swerved onto the shoulder, sideswiped his car and hit him. Daza was sent flying into the air and down an embankment. He suffered multiple, severe injuries; one of them, a transected aorta, killed him almost immediately.

After witnessing the collision, Officer Belveal continued to follow the Malibu as it exited the freeway, drove onto surface streets and around a parking lot, and ran a red light before getting back on I-80. Belveal temporarily lost sight of the car, but spotted it again later as it passed him heading east, still swerving, straddling the lane line and fluctuating between 60 and 100 miles per hour.

Belveal again alerted the highway patrol and officers arrived and effected a traffic stop. Cache's eyes were red and watery, her breath smelled strongly of alcohol, and her speech was impaired. Breathalyzer tests taken at 3:20 and 3:22 a.m. indicated a breath alcohol content of 0.15 and 0.14 percent, respectively. Investigation revealed Cache had been convicted for driving under the influence in 2008, 2009 and 2011 and that her driving privilege was restricted to operating vehicles equipped with an ignition interlock device, which the Malibu did not have.

A jury convicted Cache of second degree murder, driving under the influence within 10 years of three other DUI offenses, driving with a .08 percent blood-alcohol content within 10 years

of three other DUI offenses, hit and run resulting in death or serious injury, driving with a license that had been suspended for failing a blood-alcohol test, and driving on a restricted license without an interlock device.<sup>2</sup> The court sentenced Cache to 15 years to life on the murder conviction and imposed and stayed additional terms on the remaining convictions.

This appeal is timely.

### DISCUSSION

A criminal defendant's right to counsel is among "the most sacred and sensitive of our constitutional rights." (*People v. Ortiz* (1990) 51 Cal.3d 975, 982.) Underlying this right "is the premise that 'chosen representation is the preferred representation. Defendant's confidence in his lawyer is vital to his defense. His right to decide for himself who best can conduct the case must be respected wherever feasible.' " (*People v. Courts* (1985) 37 Cal.3d 784, 789 (*Courts*).)

Cache contends the court violated this essential right when it denied her requests to substitute her newly retained attorney on the first day of trial and for a continuance to allow him to prepare. The primacy of the federal and state constitutional right to representation by chosen counsel and the absence of significant prejudice to the People or the victim's family occasioned by the attendant trial delay compel us to agree with her.

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<sup>2</sup> An additional charge of driving with a license that had been suspended or revoked for a prior DUI was dismissed on the prosecutor's motion.

## I. Background

Cache's relationship with her assigned counsel was characterized by communication difficulties and punctuated with *Marsden* motions.<sup>3</sup> On August 8, 2016, Cache was arraigned, the Office of the Public Defender was appointed to represent her and bail was set at \$1,259,500. Initially her case was assigned to deputy public defender Forster, but it was reassigned to deputy public defender Jennifer Welch on October 18, 2016. Cache made *Marsden* motions (on November 30, 2016 , January 10, 2017 August 1, 2017 ), all of which were denied. On March 26, 2018 Cache's family retained Kevin Mitchell to represent Cache, but that relationship ended when their funds were depleted and the court denied Cache's motion for funding for private counsel. Mitchell withdrew on February 11, 2019, whereupon Welch was reappointed. On March 13, 2019 Cache made another *Marsden* motion in which she identified investigation that was not pursued, the failure to secure an accident reconstruction expert and Welch's not informing her of developments and strategy. The motion was denied. In response, Cache advised the court: "I'm going to try to see if my family can come up with more money because I know this isn't going to work."

On September 10, 2019, the morning set for trial, Welch informed the court that Cache wished to substitute attorney Christopher Varnell as trial counsel. Varnell told the court Cache's family had contacted him at 7:00 the previous evening, seeking to retain him. He said he would need 45 to 60 days to

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<sup>3</sup> *People v. Marsden* (1970) 2 Cal.3d 118.

prepare for trial and could be ready around mid-November.

Welch confirmed that Varnell had assured her he would be ready for trial in a “reasonable amount of time.”

The prosecutor argued the request was untimely, observing the case was over three and one-half years old and had been set for trial for “a number of months.” The family “had any amount of time to actually confer and meet with another attorney to see if they could substitute in, but here we are literally on the eve of trial asking to substitute in a new attorney who is going to need a new continuance.” Moreover, the victim’s family was anxious to have the case resolved and Welch was competent and prepared to try it.

Welch acknowledged she was ready for trial, but reiterated Cache’s desire that Varnell represent her at trial. She and Cache had a tumultuous relationship which, along with Cache’s strong desire for different counsel, was reflected in Cache’s earlier retention of private attorney Kevin Mitchell and her multiple *Marsden* motions. Welch explained, “You know, it’s difficult for this family—the family is not one of means—to gather the money to hire a private attorney. And this will be the second private attorney. The first one, honestly, took the case without an intention of doing the trial, which is unfortunate both for the family and for Ms. Cache. [¶] So I would just—I am ready, but I would just ask the Court to carefully consider both Ms. Cache’s desire for a new attorney, our prior relationship, and the fact that I do think that this is a different—well, I think and I hope, based

on Mr. Varnell's representations to me, that it is a different situation than that that previously existed."

Varnell confirmed he was committed to trying the case. He explained it had taken Cache's family "quite some time to come up with the means to hire someone else, so I don't think that this is simply a stall tactic. I think that this was their intention all along. They were just trying to come up with the funds."

In response, the prosecutor argued Cache's family had not indicated they were trying to retain new counsel until that morning. "So I think we're left with no other conclusion, despite the representations that have been made, that this is another delay tactic." Furthermore, the victim's family, including his fiancée who witnessed the accident, were extremely upset about the delays. "And I would say that if Mr. Varnell had been looking to substitute in two weeks ago we'd be in a different position, but this is the morning of trial when both sides are ready to go."

Welch explained that Cache was initially represented by different appointed counsel, Mr. Forster, but the case had been reassigned to her for reasons that were unrelated to Cache's relationship with Forster. Mitchell subsequently came in as retained counsel, but some nine or 10 months later he withdrew from the representation and Welch was reassigned to Cache's case.

At that point in the proceedings the court reviewed the history of the case. "I'm looking at the history here and there were a number of *Marsden* motions made—I'm assuming those were with Mr. Forster—made and denied in front of Judge

Hinton starting way back in September of 2016, at least two in front of Judge Hinton.

“And then in January of 2017, one in front of Judge Goldstein, and I believe that’s when [Welch] entered the case. The *Marsden* motion was then denied back then.

“Then I show that there was another motion on August 1st of 2017, *Marsden* motion in Department 3. That’s Judge Scanlon. That was denied.

“Then there was a request for a *Faretta*.<sup>[4]</sup> Then the *Faretta* was withdrawn all within that same time frame.

“Then trial dates were being set as of October 24th, 2017 in Department 3.

“As of March 26, 2018, Mr. Kevin Mitchell entered the case. It was taken off the trial calendar, placed on to set, and then the first jury trial setting was as of April 23rd, 2018. The first jury trial date was August 13th of 2018.

“On July 31st of 2018, Mr. Mitchell made a 1050 motion. There was no objection from [the prosecutor]. I granted it based on good cause. I then set the next trial date October 1st.

“Then on September 20th of 2018, there was another defense 1050. But he was making an oral motion, and I wanted it in writing. So we put that over to October 1st. And October 1st, [the prosecutor] was in trial, so the 1050 got granted.

“I then set November 13th for jury trial. As of November 8th of 2018, because his defense expert had retired, there was a defense 1050. And then, because of that issue,

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<sup>4</sup> *Faretta v. California* (1975) 422 U.S. 806.



finding a new defense expert, it was put on to set on November 19th before me.

“On November 19th, the defense was still awaiting funds and the expert was still reviewing information, so we put it over to November 26th.

“On November 26th of 2018, we set a jury trial date of—sorry, February 4th of 2019. And apparently, after that was set, it was heard in Department 6 because we had a change of assignments. And Judge Goldstein, on January 28th, 2019, heard a 1050, and I believe it was put over to January 31st.

“On January 31st, it was back before me. And according to Mr. Mitchell, who was still counsel, he had a . . . motion and that was pending for funding. So there was a defense 1050. I granted it. I vacated the trial. I then put it on to set on February 11th.

“On February 11th, it was before Department 3, Judge Scanlon, and Mr. Mitchell was relieved as counsel of record I believe due to the funding issue, and Public Defender was reinstated.

“So that’s when you came back in the case, Ms. Welch.”

After discussing “a large portion” of additional delay due to a writ from the denial of a motion to dismiss pursuant to Penal Code section 995, the court continued: “Again, March 3rd of 2019, there was a *Marsden* motion before a visiting judge. That was denied.

“April 29th of 2019, Judge Scanlon set the jury trial date as of September 3rd plus 10, and that brings us to today.”

Having recapped this history, the court denied Cache's request to substitute Mr. Varnell as trial counsel. It explained: "The defendant does have a right to counsel of her choice. This is the day of trial. We do have a department open. I am sending it out today to Department 31 which has been ready to take this for the last—essentially the last three days. But counsel wanted additional time and it trailed, so I gave it to them. But the witnesses are ready.

"This has been delayed for far too long for a variety of reasons. And it smacks to the Court of gamesmanship that on the morning of trial when the Court is ready to send it out and both sides are ready to send it out that a new counsel is to enter the case.

"It seems that the Court has to balance this right of the defendant against the issue of whether or not there have been delays, upon delays, upon delays, in getting this case out. The victims also have rights.

"And it would be different, Ms. Welch, if you were having some issues in terms of your competence, but that's clearly not the issue. You've always been professional and prepared before this Court, and you clearly know the law.

"So the request [¶] . . . [¶] is denied."

Cache broke down, as the court described it, "screaming and yelling in court and not allowing the deputies to transport her, and crying loudly."

The case was assigned to the trial department, where Cache made another, more fully-articulated *Marsden* motion in

which she chronicled her prior *Marsden* motions based on counsel's failure to pursue leads, interview witnesses, and inform Cache of developments and trial strategy. In response, Welch confirmed the investigation was incomplete and acknowledged Cache's frustration with her representation. The court denied the motion.

Cache also renewed her motion to substitute Varnell as trial counsel. The court referred to the "fairly lengthy hearing" in Department 35 where the judge "went through the history of the settings of the trial in this matter, at some length" and responded, "I don't think it's appropriate for me to revisit the issue here since nothing has change[d] from this morning."

## **II. The Right To Counsel of Choice**

"The right to counsel, enshrined in both the federal and state Constitutions, guarantees a defendant the right to retain counsel of the defendant's own choosing. [Citations.] The California Supreme Court has repeatedly applied this principle in reversing judgments in cases in which a defendant's right to counsel of choice was unconstitutionally abridged. [Citations.] These cases make clear that while a criminal defendant's right to counsel of choice is not absolute, that right may be overridden only under narrow, compelling, and specifically delineated circumstances. Further, a trial court must make *all* reasonable efforts to vindicate a defendant's constitutional right to counsel of choice and has 'limit[ed] . . . discretion' to intrude upon that right." (*People v. Williams* (2021) 61 Cal.App.5th 627, 631 (*Williams*); *Courts, supra*, 37 Cal.3d at p. 790 [the right "can

constitutionally be forced to yield *only* when it will result in significant prejudice to the defendant himself or in a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case’ ”]; *People v. Crovedi* (1966) 65 Cal.2d 199, 208–209 (*Crovedi*); *People v. Byoune* (1966) 65 Cal.2d 345, 346–348.) Thus, the Supreme Court has explained, “we must require of [trial courts] a resourceful diligence directed toward the protection of [the right to counsel] to the fullest extent consistent with effective judicial administration.” (*Crovedi*, at p. 209.) As a necessary corollary, counsel, “ ‘once retained, [must be] given a reasonable time in which to prepare the defense.’ ” (*Courts*, at p. 790.)

Our task is to determine whether the trial court transgressed the “stringent limitations” (*Williams, supra*, 61 Cal.App.5th at p. 640) on its discretion to intrude on Cache’s right to retained counsel of her choosing. The erroneous denial of a motion to substitute counsel, “ ‘with consequences that are necessarily unquantifiable and indeterminate,’ ” is structural error, mandating reversal per se. (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 150; *People v. Ramirez* (2006) 39 Cal.4th 398, 423.)

### **III. Analysis**

Cache contends the trial court abused its limited discretion in denying her motion in the absence of evidence the proposed 45- to 60-day continuance would significantly inconvenience the court or parties or that her request was the result of “gamesmanship.” On the other hand, she maintains, the record

affirmatively shows her request to substitute Varnell as trial counsel was based on a longstanding and genuine desire to replace Welch and that her family was unable to secure sufficient funding until just before the date set for trial. In light of these factors, and given the grave consequences she faced if convicted of murder, Cache contends the court improperly elevated the avoidance of delay and the victim's family's feelings over her constitutional right to chosen counsel.

In opposition, the People argue the court properly found the substitution would unreasonably disrupt the proceedings because Cache requested it on the day set for trial, more than three and one-half years after the accident and four months after the trial date was set. "Given defense counsel Varnell's acknowledged inability to begin trial without a delay of at least 45 to 60 days, and given the frustration of the victim's family with the slow pace of the proceedings, . . . [t]he adverse effects on the orderly administration of justice if the trial court granted appellant's eleventh-hour request were readily apparent."

The problem with this argument is that "adverse effects" substantial enough to outweigh Cache's constitutional right to counsel of choice were, and are, *not* readily apparent. To the contrary, the record fails to show a continuance would have significantly inconvenienced the court or the parties. The case had not yet been sent to a trial department. The in limine motions had not been filed. Prospective jurors had not been summoned. There is no indication in the record that continuing the trial would have resulted in any calendaring problems,

logistical difficulties, or “disruption of the orderly processes of justice.” (See *Courts, supra*, 37 Cal.3d at p. 790.) The court’s sole observation was that the witnesses were ready, but there was no argument by the People that any witnesses would be unavailable, or even inconvenienced, by a continuance to November. The record is devoid of any justification for denying the motion to substitute counsel and grant the continuance he requested to prepare to defend murder charges.

We find it telling that the prosecutor stated the situation would have been “different” if Cache had retained Varnell two weeks earlier but identified nothing that had changed or transpired in those two weeks other than that “this is the morning of trial when both sides are ready to go.” The Attorney General’s effort to distinguish *Williams, supra*, 61 Cal.App.5th at pp. 641–642, 655, is unpersuasive. The prosecution in the *Williams* murder case had spent thousands of dollars to transport and house an out-of-state witness and another witness, a retired police officer, had planned extensive surgery and long-term travel after the scheduled trial. Nonetheless, the Court of Appeal reversed the denial of a motion to substitute private counsel and for a four-month continuance made on the first day of trial, holding those circumstances were insufficient to override the defendant’s constitutional right to counsel of his choosing. (61 Cal.App.5th at pp. 656–657.)

We understand the trial court’s concern that the delay would upset the victim’s family and, particularly, his fiancée, but there was no indication that the delay would impede their ability

to attend the trial. Nor was there any suggestion that the relatively brief continuance would inconvenience any witness. Cache faced the prospect of spending 15 years to life in prison. (Pen. Code, §190, subd. (a).) As observed in *Williams*, “when one considers that the 23-year-old defendant was facing life in prison without parole, we cannot say that a delay of a few months ‘would have *significantly* inconvenienced the court or the parties.’” (*Williams, supra*, 61 Cal.App.5th at p. 657, fn. 23.) We reach the same conclusion here.

Also, as in *Williams*, the record fails to substantiate the trial court’s suggestion that Cache’s desire to replace Welch was not genuine—e.g., that it “smack[ed] . . . of gamesmanship.” (See *Williams, supra*, 61 Cal.App.5th at pp. 650–651.) It is undisputed that Cache had long been extremely dissatisfied with Welch’s representation and had engaged in extensive efforts to replace her. She had argued four *Marsden* motions against Welch since November 2016, asserting each time that Ms. Welch was not pursuing her case and adequately communicating with her. Cache’s unhappiness with Welch was so pronounced that 18 months into the case her family “did all type of community—charity work and all type of stuff” to raise money to retain Mr. Mitchell. Mitchell’s withdrawal some 10 months later when those funds ran out cannot be blamed on Cache.<sup>5</sup>

On March 13, 2019, within weeks of Welch’s reappointment in the wake of Mitchell’s departure, Cache made her fourth

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<sup>5</sup> According to Welch, Mitchell charged Cache’s family \$7,000 and did almost nothing to pursue her case.

*Marsden* motion. In her view, Welch “had a personal issue with me. And I feel like her coming back on the case is a conflict of interest. [¶] And if she came back on the case, I really feel like she would be playing the surrogate prosecutor. Because why would you come back on the case with somebody that you clearly dislike?” According to Cache, Welch would work on the case when her supervisor intervened, but “two weeks, a month after that, nothing is done.”<sup>6</sup> Welch acknowledged that Cache had been upset with her for most of the representation, had refused entirely to meet with her since Mitchell withdrew, and told Welch’s supervisor she would not speak with Welch.<sup>7</sup>

We observe that the judge who ruled on the substitution motion had not presided over any of Cache’s *Marsden* motions, and, therefore, was not privy to the substance, timbre, or consistency of her complaints about Welch. Apparently the judge

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<sup>6</sup> To clarify, these were Cache’s views. By expressing them in this one-sided fashion we do not mean to indicate any judgment or criticism of Ms. Welch’s performance, and emphasize that at each *Marsden* hearing the court declined to replace her with new appointed counsel.

<sup>7</sup> Cache elaborated on these complaints in a new *Marsden* motion on September 10, 2019 after the court denied her substitution request, detailing why she felt Welch’s communication with her was “just so terrible. Like . . . she’s just not the attorney for me. [¶] . . . [¶] I ask her certain things about the case and she won’t tell me. Like, it’s things I have to ask her a million times to send me. And, you know, I’m not an attorney. I don’t know nothing. This is my first time getting in trouble. So it’s stuff about the law that I don’t know.” Welch again acknowledged that the relationship had not “clicked” and that Cache had been consistently dissatisfied with her representation.



gleaned her limited understanding of the relevant history from terse docket entries that documented that Marsden motions had been made with no indication of the basis for Cache's repeated complaints. Rather than crediting the numerous *Marsden* motions as evidence of at least a fundamental breakdown in communication between counsel and client, the court interpreted the substitution motion as evidence of "gamesmanship." The record reflects the contrary.

Cache had been in custody for more than three years. The record does not reflect an effort to delay the trial, but rather a consistent history of her dissatisfaction with Welch. In each of the four *Marsden* motions that preceded the substitution motion Cache specifically identified her view of Welch's failure to communicate regularly, failure to explain her defense strategy, and failure to secure and to interview prospective witnesses.

The master calendar judge denied the motion to substitute counsel and sent the case to the trial court. There Cache renewed her motion to substitute counsel and made her fifth *Marsden* motion against Welch. To her credit, Welch acknowledged—on the day of trial—that "I think that I do have ideas about what our defense or defenses will be; but, it is a little fluid." In response to Cache's complaint about the lack of adequate investigation, Welch admitted: "[T]here have been some issues with the investigation, and I'm not going to try to sugarcoat that. It was assigned to one investigator. That investigator was reassigned to a different assignment in our office, so it was reassigned. And there are three witnesses that Ms. Cache wanted me to have the

investigator speak to. She has spoken to two out of the three. [¶] Honestly, the investigator has not done things as timely as I would have wished. . . . [¶] So I agree that the interview of the two happened late—later than I would have liked, but it has happened.” As to the third witness, who had not been interviewed, “there also, honestly, is some significant impeachment information about—from that one witness that I’m aware of. [¶] . . . [¶] So I still actually hope that my investigator can speak to that person.”

In response to the trial judge’s inquiry whether she had communicated this information to Cache, Welch acknowledged, “I had not talked to her about the impeachment information, no.” Welch summarized for the trial judge, “I understand Ms. Cache’s frustrations. And, you know, I’m not going to lie, I don’t think it’s been a relationship that has clicked, as she would say, easily. It hasn’t. And I want to be fair to her in that, that it hasn’t. [¶] . . . And I do think that there has been a consistency to Ms. Cache’s dissatisfaction, which is present, and which I think that she articulated as well.”

The trial judge denied both the renewed motion to substitute counsel and the *Marsden* motion. We understand the challenges confronting courts, especially where—due to the longevity of the case—matters are decided by multiple judges without the benefit of transcripts of prior proceedings. “We do not demand prescience of trial courts faced with decisions involving the right of representation by counsel—but we must require of them a resourceful diligence directed toward the protection of

that right to the fullest extent consistent with effective judicial administration.” (*Crovedi, supra*, 65 Cal.2d at p. 209.)

But we are also persuaded that, as in *Williams*, there is no basis here to find Cache was unduly dilatory. Dissatisfied with Welch, Cache retained Mitchell. When she exhausted her resources, in an effort to proceed with counsel of her choice she moved for necessary funding from the court. But, as with her *Marsden* motion, her request was denied and she was reassigned to Welch, with whom she had an unsatisfactory relationship. When Varnell sought to substitute for Welch, both attorneys explained that Cache’s family’s meager finances impeded her ability to retain counsel sooner. Those representations were undisputed. Cache’s consistent efforts to obtain counsel with whom she could work effectively—whether through retained or appointed counsel—are well documented. The record belies any suggestion Cache was simply trying to delay the proceedings.

The Attorney General’s argument that Cache should have notified the court sooner of her family’s intent and efforts to hire private counsel defies logic: Cache could not alert the prosecution and the court to her efforts to substitute counsel until she secured the funds to hire an attorney and identified an attorney willing to be retained on her terms and able to prepare for trial hurriedly, given the imminent trial date. Not knowing whether or not those efforts would succeed, Cache could not be expected to advise her deputy public defender, and through her the court, of her efforts to replace her until a substitute was secured. And that is what Cache and her family did. In these circumstances, her failure to

alert the court sooner to the hoped-for substitution is understandable and does not warrant the sacrifice of her constitutional right to chosen counsel.

We are cognizant, as was the trial court, that the case had already been continued a number of times for a variety of reasons. But the record neither supports an inference the substitution request was unduly dilatory or “gamesmanship” nor indicates the additional delay required for Varnell to prepare for trial would significantly interfere with the judicial process. “[A] defendant’s constitutional ‘right to chosen counsel [citation] must be respected, even when a byproduct of a concrete and timely assertion of that right is some disruption in the process.’” (*Williams, supra*, 61 Cal.App.5th at p. 657, quoting *Courts, supra*, 37 Cal.3d at p. 795; *Crovedi, supra*, 65 Cal.2d at pp. 207–208.) The court weighed the regrettable distress for Mr. Daza’s family from a two-month delay against Cache’s constitutional right to counsel of her own choosing. “[A] myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. [Citation.] There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.” (*Crovedi, supra*, 65 Cal.2d at p. 207.) We find the court struck the balance incorrectly and should have granted the continuance to allow the substitution.

The Attorney General’s effort to distinguish *Williams* is unavailing; we find it highly persuasive. There, as here, the defendant moved to substitute in private counsel on the morning set for trial. (*Williams, supra*, 61 Cal.App.5th at pp. 641, 643–644.) The attorney said she would need a four-month continuance to take care of other trials and prepare to try the case. (*Id.* at pp. 641, 643, 648.) The prosecution opposed the motion based primarily on the efforts and expense it had undergone to bring in the out-of-state witness; the stress and frustration of the victim’s family; and the fact that a police officer involved in the case was available to testify, but had extensive surgery and travel planned following the expected trial dates. (*Id.* at pp. 641–642.) The court denied the motion as untimely and dilatory and because the four-month continuance requested by new counsel was unreasonable. (*Id.* at p. 649—650.)

After conducting a detailed review of the controlling state and federal law, the Court of Appeal held the denial was an abuse of the trial court’s “ ‘severely’ limited discretion” in this area. (*Williams, supra*, 61 Cal.App.5th at pp. 650, 634–640.) It observed the trial court’s finding of dilatoriness was unsupported by the record and, to the contrary, that Williams had requested the substitution as soon as his mother was able to secure the necessary funds. The record also demonstrated the defendant genuinely wanted to replace an appointed attorney he distrusted and could not communicate with. (*Id.* at pp. 650–651.)

The *Williams* court found the time and effort it took Williams’ mother to obtain the money to hire an attorney and

delays in resolving a *Marsden* motion were compelling circumstances that mitigated the lateness of Williams’s motion. (*Williams, supra*, 61 Cal.App.5th at p. 652.) Moreover, “although the case had been pending for approximately two years, given the seriousness of the charge and the potential sentence of life in prison without parole for Williams, we see nothing that suggests that the case was proceeding at an unduly slow pace, and certainly nothing indicating that any delay in the resolution of the case was attributable to any gamesmanship on Williams’s part or to any improper tactics on the part of his counsel.” (*Ibid.*, fn. omitted.) Absent evidence the requested continuance would harm, rather than inconvenience, the prosecution’s case or unreasonably disrupt the orderly processes of justice, the appellate court concluded the trial court erred in “permitting expedience to take precedence over” the right to counsel of one’s choice. (*Id.* at p. 657.)

The few factual distinctions between *Williams* and this case are dwarfed by those which lead to the same outcome as in *Williams*. That this case was pending for three and one-half—rather than two—years, and that the notice of substitution was on the day of—rather than six days before—trial does not justify denying a defendant facing a life term the right to counsel of her choice.<sup>8</sup> The requested continuance in *Williams* was at least twice

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<sup>8</sup> The People attempt to further distinguish *Williams* on the ground that the record here “is silent on” Cache’s family’s efforts to retain private counsel between the March 3, 2019 *Marsden* hearing and the night before trial six months later, when they

the length of that requested by Varnell; the *Williams* prosecution had already gone to substantial effort and expense to transport the out-of-state witness; and another witness would likely be unavailable if the continuance were granted. While the People emphasize that Williams’s appointed attorney said her client’s feelings about her had been detrimental to her ability to prepare, there was no suggestion counsel was less than competent<sup>9</sup> or unready to proceed or that such detriment figured in the appellate court’s analysis of the constitutional issue. (*Williams, supra*, 61 Cal.App.5th at pp. 650–651.) None of the countervailing factors potentially prejudicial to the People in *Williams* were present here. And most significant in our analysis of the constitutionally protected right to counsel, Cache repeatedly identified and disclosed to the court her perceived failings in the representation as to communication, strategy, investigation, and preparation.

The Supreme Court has cautioned that “ ‘[t]here are no mechanical tests for deciding when a denial of a continuance [to allow counsel of the defendant’s choice to substitute in] is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly the reasons presented to the trial judge at the time the request is denied.’ ” (*Crovedi, supra*, 65 Cal.2d at p. 207.) Under the circumstances of

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retained Varnell. This ignores the undisputed representations that the family had been scrambling to come up with funds for a private lawyer until shortly before trial.

<sup>9</sup> Indeed, the denial of Williams’s *Marsden* motion just a month earlier contradicts any such suggestion.

this case, we conclude the trial court's ruling was not informed by the exercise of "resourceful diligence directed toward the protection of [the right to counsel] to the fullest extent consistent with effective judicial administration." (*Id.* at p. 209.) The error is structural and therefore requires reversal without regard to prejudice.

### **DISPOSITION**

The judgment is reversed. The case is remanded to the trial court for further proceedings.



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Ross, J.\*

WE CONCUR:

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Pollak, P.J.

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Streeter, J.

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\* Judge of the San Francisco Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.